

THE CONSTITUTIONAL PRINCIPLE OF DIRECT DEMOCRACY – DEFINITIONAL ISSUES

The science of constitutional law uses a broad range of terms characterized by ambiguity and vagueness which are accepted at the same time mechanically, in a kind of intuitive way, without a deeper theoretical and cognitive reflection. This situation is a source of confusion and difficulty in the proper understanding and description of not only specific solutions in scope of constitutional law, but also their comprehensive overview and evaluation. The term „direct democracy” which is the subject matter of my paper belongs to this specific group. I would like to point out that it is not my purpose and idea to try to establish a desired and proper understanding of this term, but rather I want to share the doubts and dilemmas relating to herein mentioned approach to the science of constitutional law.

The principle of direct democracy is generally explicitly proclaimed in the constitutions of democratic countries, including countries of Central and Eastern Europe, as one – next to the principle of representative democracy – of the planes of accomplishment of the idea of national sovereignty (the people). This is also characteristic for the constitutions of countries which belong to The Visegrad Group. Polish Constitution of 2 April 1997 states, „The Nation shall exercise such power directly or through their representatives” (article 4, paragraph 2). Under the Constitution of the Republic of Hungary of 1949: “In the Republic of Hungary supreme power is vested in the people, who exercise their sovereign rights directly and through elected representatives” (article 2 paragraph 2). The Constitution of the Slovak Republic of 1992 states: “State power is derived from citizens, who execute it through their elected representatives or directly” (article 2 paragraph 1). The Constitution of the Czech Republic of 1992 claims that “A constitutional law may stipulate the cases when the people exercise state power directly” (article 2 paragraph 2). Being part of the constitutional order of the Czech Republic the Charter of Fundamental Rights and Freedoms declares: “Citizens have the right to partici-

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pate in the administration of public affairs either directly or through free election of their representatives” (article 21 paragraph 1).

It is worth noting that, taking into consideration the participation in our conference guests from the Republic of Belarus, in such a way perceived role of collective sovereignty – a nation (people) is far from the expression used in the constitution of this state: “The people shall exercise their power directly and through representative bodies in the forms and within the limits specified in the Constitution”. (article 3 paragraph 1). This expression, in fact, identifies direct democracy with representative democracy. I should be added, however, that the Constitution of the Republic of Belarus includes other, more precise description of this issue – namely, article 37 states: “Citizens of the Republic of Belarus shall have the right to participate in the solution of state matters, both directly and through freely elected representatives. The direct participation of citizens in the administration of the affairs of society and the State shall be safeguarded by the holding of referenda, the discussion of draft laws, and issues of national and local significance, and by other means specified in law”. In the established course of action the citizens of the Republic of Belarus take part in the consideration of issues of state and social life during the republican and local meetings (article 38). It is quite evident that the constitution of this country does not mention holding or exercising power by the people, but only mention their „participation” and it is certainly a significant difference in defining the role of society in nationwide and local decision-making processes.

Only a few constitutions omit the key institution – the referendum, saying about a mere representative form of holding power by the people. Belgium (see article 36 of the Constitution of Belgium of 1831) and Finland (see article 2 of the Constitution of 1999) are these exceptions. The U.S. Constitution of 1787 does not include provisions of the federal referendum, and the Federal Basic Law of 1949 provides for such a referendum only in case of the new territorial division within the Federal Republic of Germany (article 29, paragraph 2).

Taking into account the way of the constitutional regulations that govern the referendum and – more broadly – the direct participation of the people in the exercising power it must be regarded as abortive to claim that the constitutions are giving priority to representative democracy, granting to a direct democracy a secondary, subsidiary role. In the light of these provisions the rank of the political system of these two types of democracy is the same, they are to contribute in the same degree to ensure that the sovereignty of the nation does not remain a mere declaration.

It should be noted that the principle of a direct democracy constitutes the standard of the state of this type found in many international documents, put even before the representative form of citizen participation in exercising power.

It was already stated in the Universal Declaration of Human Rights, adopted by the General Assembly on 10 December 1948, that, „Everyone has the right to take part in the government of his country, directly or through freely chosen representatives (article 21). International Covenant on Civil and Political Rights adopted on 16 December 1966 by the National Assembly established the right of every citizen to „participate in the conduct of public affairs directly or through freely chosen representatives” (article 25). In turn, Charter of Paris for a New Europe, signed on 21 November 1990, includes a commitment of the CSCE participating states „to respect the right of its citizens to participate in the exercising power of his country, directly or through representatives”.

The term „direct democracy” itself is not a subject to a broader dispute. It gained widespread acceptance in the constitutional doctrine. But it should be noted that also other terms were and are still used to this day. Max Weber, for example, used the term of „instant democracy”, James Madison – „a pure democracy,” and Thomas Paine – „simple democracy”². There should also be mentioned the name „populist democracy” whose followers call for a total abolishment of intermediaries between the people and the authorities, as well as for the majority ruling system based on the directly expressed will of the people. A separate mention is required to the use of the term „participatory democracy”, which by some theorists is sometimes referred to any forms of activity of citizens in decision-making processes, also through the use of a representational mechanisms, leading to „the political influence of citizens on who governs and how” and by others – only for the direct participation of individuals in these processes.

On the whole, the term „direct democracy” is mainly used in two aspects. The first, which I would call of the entire system, is to identify such a system in which the citizens themselves and directly settle all essential public issues. Such a system is devoid of instruments of the impact of the society on the purview of decisions in these matters through the representative bodies, as a body of supreme authority, sovereign, rules directly, without using any intermediary³. Such a model of governance was performed in the ancient states – cities. Today, direct democracy conceived in this way is practiced in Switzerland in one canton and in four

2 See M. Marczevska-Rytko, *Demokracja bezpośrednia w teorii i praktyce politycznej*, Lublin 2001, note 72, p. 30.

3 As explained by G. Sartori, direct democracy can be defined as „democracy without representatives and without representative conveyor belts” (*Teoria demokracji*, Warszawa 1994, p. 145–146). This scholar distinguishes democracy: a) direct, b) by a referendum, c) elective d) representative. Democracy through a referendum is for him as a kind of direct democracy. In his opinion, however, there are two reasons for the treatment of such democracy as a separate type: „One is that democracy by referendum is” direct „in the sense that there are no intermediary bodies in it, however, it loses another feature of direct democracy – the directness of the interaction, it is [...] direct democracy of isolated, separate entities –not affecting and interfering the participants. This is an important difference. Another reason is that the instrument of a referendum can also be entered into the theory and practice of representative democracy” (*ibidem*, p. 146–147).

half-cantons, in the form of “rural meetings” (*Landsgemeinden*), in which the total citizens take the most important for a given community decisions, including constitution of generally binding law acts. Apart from that, it constitutes the characteristic of the local system of about 1200 municipalities in six of the U.S. states: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont, in the form of town meetings that enable the total of commune inhabitants to decide about its affairs⁴.

The model of direct democracy, referred to, was characteristic of the Marxist vision of the communist system, as well as a utopian slogan of numerous revolutions. It is also referred to in the populist and participatory visions of democracy. The common assumption adopted by the proponents of such a perception of a direct democracy claims that the power belonging to the people should be exercised by the people themselves, and not – as it is in the state where there are representative institutions used – in fact by the political elite. In case of such an argument, J.J. Rousseau’s assertion that sovereignty cannot be represented is frequently invoked.

In the second aspect, that I propose to call institutional, direct democracy and its institutional forms are treated as one of the planes of realization of the idea of national sovereignty (the people) or social participation in the exercise of public authority, that appear alongside the institution of representative or indirect democracy. In such a turn the people (the nation) act – as a sovereign – in the forms of both direct and indirect, through their representatives. Such understanding of direct democracy – only as the element of a wider process of public participation in the exercise of power in the country – will be useful for my further reflections.

In the context of such an understanding, an issue of paramount importance is to determine what forms of social activity, ways for citizens to express their will, can be regarded as institutions of direct democracy, that is – what is the scope of the physical concept of „institutions of direct democracy”. There are considerable differences of views concerning this issue. Formulated in the literature of the subject general definitions of direct democracy within the meaning adopted by us contribute little, the more so as they also capture the essence of this kind of democracy variously. A common feature of majority of them is a statement that the essence of direct democracy lies in the participation of the citizens in the exercise of their retained sovereignty, without any intermediary, and therefore their direct participa-

4 In the 119 communes the herein mentioned assemblies exist in two modified forms. In 51 they have the form of representative commune assemblies (*representative town meetings*), for which it is characteristic to delegate by the persons authorised to participate in traditional meetings their imperious powers to a relatively large number of representatives. In 68 municipalities, however, the possibility to outvote the discussed issues at general meetings was eliminated, thus denying their participants the right to decide (the final decision is taken in referenda). It should be noted that in the remaining 65 communes, in general, the commune assemblies were abandoned, and substituted by representative bodies. K. Zwierzchowski, *Amerykańskie instytucje demokracji bezpośredniej*, Białystok 2005, p. 29–30.

tion in the settlement of important to them issues. On the basis of such statements, however, it is impossible to create an exhaustive list of the institutions of direct democracy, because it leaves ample room for loose interpretation. It is therefore necessary to look at the interpretations of those theorists who do not stop with the formulation of a general definition of direct democracy, but apart from that they also point to its institutional forms.

As the extreme should be considered a view on direct democracy that recognizes for its institutional forms all aspects of social activity aimed at the impact on the course of public affairs, or directed at the articulation of the will and interests of citizens. Such an approach was typical, in particular, for the doctrine of constitutional law of the countries of real socialism. As it was ascertained in one of the contemporary Polish constitutional law textbooks, „for the socialist constitutional position on this matter it is much wider than the bourgeois constitutionalism to treat forms of direct democracy, identifying them with all possible beyond-representative forms of democracy”. Analysis of the practice of socialist countries – according to the author of that assertion – permits the following classification of these forms: 1) the form of direct citizen participation in lawmaking process (for example the constitutional referendum and referendum laws), 2) forms of social self-government (labourers’ self-government, cooperative self-government, residents’ self-government), 3) the form of direct joint participation (participation), such as: a) form of citizen participation in the activities of state authorities (such as people’s consultation, involving the participation of citizens in the discussion on drafts of acts or resolutions of national councils), b) forms of joint participation between citizens with administration authorities (for example, civil teams operating close to the organs of administrative power), c) forms of joint participation of citizens in the widely understood justice administration and settling disputes (e.g. the institution of people’s lay judge, misdemeanour court, different types of social courts)⁵. This way of understanding democracy very strongly marked its presence in political science and legal literature in the USSR, in which, apart from these listed above, staff meetings, self-governments, the forms of joint participation of citizens in the activities of state bodies, all kinds of elections, participation in rallies and May Day parades, among others, were considered as forms of such democracy. It was even proclaimed that the revolutions, and „socialist revolution” in particular also belonged to these forms. In such presentation of direct democracy in a socialist state a pursuit of proving, at any cost, the fairness of a proclaimed then argument about a superiority of „socialist democracy” over „bourgeois democracy” was easily seen.

5 Z. Jarosz, S. Zawadzki, *Prawo konstytucyjne*, Warszawa 1980, p. 158–160.

In my view, it is also too broad reckoning among the institutions of direct democracy, both the direct participation of citizens in making tangible personal (subjective) decisions, characterized by the settlement – by the periodic elections or by recalling – about the staff of the collective representative bodies (parliaments, resolution-making bodies of the local government), or about the staff of some other offices and positions in the system of public authority (e.g. the head of state, judges), as well as about the dismissal of certain public office holders. This approach seems to be a kind of a reminiscence of anachronistic association of democracy with the forms of direct democracy. An ascertainment that seems to be accurate follows: „such a demand would be fully rational only if we consider the supremacy of the form of expressing a will of a sovereign as fundamental prerequisite distinguishing the institution of direct democracy from representative democracy”⁶. In addition, although the elections and dismissals, as a form of expression of the social will, are distinctive due to personal social activity, they are tightly linked with the essence of representation, and they are the procedures that initiate or interrupt a process of representation. Thus, the interpretation of direct democracy, referred to, blurs the institutional dichotomy between this kind of democracy and representative democracy. As a consequence of all of these, an argument sometimes invoked for recognition of removability as an instrument of direct democracy is not convincing – the fact that by stimulating a trustee’s stronger dependence of his constituents, it modifies the decision model of the representative system⁷. This argument also applies to the well-known in the 27 states of the U.S. recall procedure, which is ranked very often – what happens in Poland, too – as an institution of direct democracy. It should be recalled that this procedure allows the U.S. citizens to dismiss elected officials, and in the 18 states, not only local but also state ones, and thus constitutes a kind of reversal of the electoral act.

It is not easy decide to accept one of the presented in the literature of the subject restricted interpretations of the scope of the institutions of direct democracy. As part of this trend the most frequently for the criteria of the recognition of methods of social participation for institutional forms of direct democracy tend to be adopted: 1) expressing one’s will only by voting; 2) making the final, legally binding decisions; 3) citizens’ participation in the lawmaking process. Opting for the first of these criteria must mean extending the concept of direct democracy only to popular assembly and the referendum. Even narrower would be set of institutions of direct democracy in case of acceptance of the second criterion – a popular assembly, and not all referendums, but only those which results shall prevail. Most forms of civic activity fall under the third criterion – popular assemblies, referenda,

6 K. Zwierzchowski, *Amerykańskie...*, *op. cit.*, p. 17.

7 *Ibidem*, p. 18–19.

which are the subject of normative acts (and therefore not all), people's initiative, a popular veto and consultation of these acts.

The use of any of these criteria falls into dissonance with mostly adopted in the literature of the subject traditional directory of the institutions of direct democracy, which includes: popular assemblies, all kinds of referenda, popular initiative, popular veto, and apart from that – not rarely – all sorts of consultations. Such a classification of the means of the citizens' direct participation in the exercise of power is not subordinated to any of mentioned above criteria. In the highest degree, it corresponds to a criterion of public participation in lawmaking, but this degree is not high because the subject of the resolutions of referenda and popular assemblies, do not need to be only legislative acts, but specific issues; the same can be said about the subject of consultation. And this what is extremely significant is the fact that all of these mentioned manifestations of social activity are placed among the institutions of direct democracy by a considerable number of the authors, treating one of the three above-mentioned criterion of direct democracy as its immanent feature, but still adding to its forms those institutions that do not meet the approved requirement. The reason for this may be some habits, acquired stereotypes, or simply – confusion resulting from the absence of generally accepted definition of direct democracy, without leaving a wide field for a variety of interpretations. It is certain, however, that this situation is a source of misunderstandings and ambiguous, unclear perception of the discussed here plane of realization of the principle of sovereignty of the nation.

To express the idea, sense and purpose of direct democracy, it would be the most satisfying to refer to its radical understanding as the whole of institutional forms of expressing the citizens' will of an imperious character, it means these that enable them to make final, irrefutable decisions concerning public affairs. It should be emphasized that only such forms correspond to the full content, such as used in the constitutions of countries of the Visegrad Group, the formula 'of exercising power directly'.

This would mean bringing lawmaking referendums, popular initiatives and popular veto outside the framework of direct democracy. These institutions should be rather placed among other types of civil rights serving the realization of the idea of national sovereignty – allowing to express an opinion on the exercise of public authority⁸. Their essence is merely articulating citizens' positions on specific issues, and not to prejudge their solution, which belongs to the relevant bodies in the

8 Powers of this type are the third – alongside with representative democracy and direct democracy – platform for the completion of the idea of sovereignty of the people distinguished by M. Sobolewski in *O pojęciu suwerenności ludu*, (in:) *Księga pamiątkowa ku czci Konstantego Grzybowski*, Kraków 1971, p. 241 and the following pages; E. Zwierzchowski, *Wprowadzenie do nauki prawa konstytucyjnego państw demokratycznych*, Katowice 1992, p. 13 and the following pages.

apparatus of public power. In case of popular initiative, in addition, we are dealing with activities which are optional phase of the legislative procedure. It has to be remembered, however, that the legislative veto can „transform” itself into the institution of direct democracy, if it will lead to a referendum. The same conclusion can be drawn with respect to the considered by some representatives of constitutional law as an institution of democracy of the direct public consultation which – apart from the method of expression – are the same in his character as lawmaking referendum, which, not without a reason, is called a consultative referendum. Summing up, in presented here understanding of direct democracy there are included sovereign popular assemblies and decisive referendums. It also includes a well-known in the U.S. institution of the electoral appeal of judgements.

And one more remark: the legal regulation of a referendum of a constituting character often deprecates the importance of such a referendum as an institution of direct democracy. Thus, it is they who decide on whether the nation will appear in the role of the constitutional entity of the sovereign power. With this in mind, as well as previously depicted findings, we can even ask whether or to what extent the concept of „direct democracy” in general agrees with contemporary decision-making processes. Practice convincingly demonstrates that direct democracy as a general method of governance by the nation – apart from occasional exceptions on a local level – in fact anywhere in the world does not exist; at least, only some of its mechanisms are used which act as a corrective factor of representative governments⁹.

From the perspective of the scope of participation of the nation in the process of exercising power, a direct democracy in terms of systemic aspect, is incomparably higher than representative democracy, much more affirming an attribute of its sovereignty. But is real, that a direct democracy prevailed in the present-day countries? The answer – as it seems – must be: no. G. Tinder aptly called „idealists”, the supporters of the introduction of direct democracy, usually referring to thoughts of J.J. Rousseau, that “sovereignty can not be represented”, stating: „supporters of direct democracy generally base more on hope than on experience; on the fact that who people could become rather than who they have always been. There are at least two appealing visions inspiring ideal of direct democracy, and it is unlikely that any of them could be undermined by the argument based on a common sense”¹⁰.

9 Interesting and worth consideration is the postulate formulated by T.E. Cronin, that amalgam of representative government and the previously mentioned factor should be considered as a third model of democracy (in addition to representative democracy and direct democracy) – „rational democracy”. T.E. Cronin, *Direct Democracy. The Politics of Initiative, Referendum and Recall*, Cambridge–London 1999, p. 246–251.

10 G. Tinder, *Myślenie polityczne. Odwieczne pytania*, Warszawa 1995, p. 119.

A number of arguments can be mentioned against a direct democracy as a constitutional form of a state. Let's start by citing the „classic” attitudes on this matter. A very serious problem is the inability of a society as a whole to direct rule. As an argument against a direct democracy, this problem was already used by Montesquieu. Writing about executive power he pointed out: „People quite surprisingly know how to choose those who should be entrusted a portion of power. [...] But whether the nation can lead a case, choose the place, take advantage of the circumstances and the right moment? No – it cannot do that”. Referring to legislative power he remarked: “because in a free country, every person deemed to be holding a free soul, should govern himself, so it is necessary for the nation as a whole to have legislative power; however, in large countries it is not possible, and in small – associated with many disadvantages, so the nation what it cannot do itself, must be done by its representatives. [...] The great advantage of representatives is the fact that they are able to discuss matters. The nation is completely unable to do so – that's one of the great inconveniences of democracy”. An extension of Montesquieu's remarks were De Lolme contestations: “The vast majority of a crowd, torn by more urgent necessities of life, have no free time, and as a result of inadequate education – there are not even messages needed to perform such activities. Besides that, the nature, giving their gifts sparingly, it gave very few people brains, capable of understanding the complicated combinations of legislative; and similarly, the same as a patient trusts a doctor and a litigious trusts a lawyer, the vast majority of citizens must trust people more capable of managing affairs as close to them, which correct solution requires so many qualities at the same time”. He also argued: “a crowd, because of the nature of a crowd has no chance and possibility to give a reasoned and motivated judgement”. A similar approach was also expressed by F. Sieyes, giving an opinion that the people directly involved in the establishment of laws is a „feature of true democracy”, however, „the vast majority of our fellow citizens do not have either sufficient training or free time to be personally able to develop laws to govern France”¹¹.

This way of thinking of Montesquieu, De Lolme and F. Sieyes has been reproduced countless times and still has many followers. It is understandable, although the level of education and political consciousness of modern societies is incomparably higher than in the eighteenth and nineteenth century, but, after all, in relation to the huge development of civilization and connected with it an increasing complexity of tasks of a state, the requirements for desirable qualifications necessary to make rational, the most reasoned decisions, often involving vast expertise and specialization, both in lawmaking as well as the management of state communities issues have exorbitantly increased. In addition, invariably time necessary to actively

11 Opinions of Montesquieu, De Lolme and F. Sieyes quoted after A. Esmein, *Prawo konstytucyjne*, Warszawa 1921, p. 311–313.

participate in the exercise of public authority, which would pose many problems today. As already quoted G. Tinder explains, “Representatives can devote all their time to ruling, while the people as a whole cannot. As a result, because governments must be exercised constantly, representative democracy is able to provide a more secure control over daily affairs of government than a direct democracy”¹². Another argument alleged today is a form of decision-making system of a direct democracy. Kind of „classic” in this case is the view of A. Esmein: It removes the „first of all, the possibility of any serious trial to the body, which has given the ultimate sanction of law. The discussion was still possible in ancient small republics, when the assembly of the entire nation could be held on one public square next to the speakers’ rostrum, where in turn the most prominent citizens and the first speakers in the nation appear. And this is impossible during thousands of meetings, because for thousands would a great nation divide to make the popular, people’s vote. It is impossible”¹³. Not without significance is also the threat of emotions that may prevail among the people gathered in a large group. To these arguments I would add a few more, like a huge organizational difficulties connected with the creation of appropriate conditions for direct public participation in governing, the enormous costs and the requirement for the sake of efficiency and effectiveness of decision-making processes. We could not forget about passivity and lack of interest in public affairs is usually a significant part of society.

In conclusion, I share many views that a direct democracy in terms of systemic aspect could function only in small territorial units. In terms of such units, there are real chances for a direct democracy to become an effective form of public participation in the exercise of public authority. But nothing suggests that in contemporary conditions of statehood it has become a part of political practice. The previously mentioned extensive direct participation of citizens in the exercise of power in several Swiss cantons and in the form of American town meetings should be rather associated with the impact of tradition rather than with currently outlined tendencies to strengthen the role of society in decision-making processes.

Some hope in this area raises the rapid development of electronic technologies, allowing an increasing circle of people to communicate freely and engage in a public dialogue. I would be cautious in formulating hurray-optimistic statements about the looming of a new age – electronic democracy, creating conditions for widespread citizen participation in public life. It appears to be inevitable that a significant expansion of this participation and the development of its forms. The electronic revolution, in particular, should encourage: 1) increasing the transparency of political processes, 2) strengthening the involvement and civic participation, 3)

12 G. Tinder, *Myślenie...*, *op. cit.*, p. 118.

13 A. Esmein, *Prawo...*, *op. cit.*, p. 314.

improving the quality of the formulation of views by opening up new areas of information and deliberation¹⁴. I would not risk the thesis that in this way the prerequisites for the realization of full democracy in terms of systemic and therefore as a share of all units in the final, decisive decisions on all matters of importance, both nationwide and local have been created.

It seems, however, that the electronic revolution creates prerequisites for the construction of alternative representative systems, which could diminish the role of elections as a way to delegate a representative function, and even call into question the need for their implementation. In this context, in particular, the proposals referring to the sociological understanding of the term „representation” as a representative or a certain relation of similarity should be noticed. According to these concepts, this revolution, modern communication techniques, more and more perfect methods of testing public opinion allow for an easy selection of representative samples of people accurately reflecting the statistical cross section of society. Thus, quite real is the process of shaping in that way the composition of representative bodies – or at least some of their parts – without the need for elections, as well as updated permanent staffing of these bodies, depending on the changing characteristics of the represented population and resolved problems. Among the advantages of such a representative system we can indicate: a fuller expression within its current opinions of the citizens, abandoning the non-support in the political practice legal concept of a free mandate, ensuring a real participation in the exercise of power to wide circles of society, including various types of minorities and, consequently, because the introduction of these – as defined by A. Toffler – the “semi-direct democracy”¹⁵.

14 A.H. Trechsel, R. Kies, F. Mendez, P.C. Schmitter. *Evaluation of the Use New Technologies In Order to Facilitate Democracy In Europe*, Report for the European Parliament Scientific and Technological Options Assessment Series (STOA Report), 2004.

15 A. Toffler, *Trzecia fala*, Warszawa 1997, p. 633 and the following pages.